

Nos. A09-2212, A09-2213, A09-2214, A09-2215

State of Minnesota
In Supreme Court

Michael D. Frazier, as Trustee for the
 Next-of-Kin of Brian L. Frazier,

Appellant (A09-2212),

Harry James Rhoades, Sr., as Trustee for the
 Next-of-Kin of Harry James Rhoades, Jr., deceased,

Appellant (A09-2213),

Denise Renee Shannon, as Trustee for the
 Next-of-Kin of Bridgette Marie Shannon, deceased,

Appellant (A09-2214),

Elizabeth Chase, as Trustee for the
 Next-of-Kin of Corey Everett Chase, deceased,

Appellant (A09-2215),

vs.

Burlington Northern Santa Fe Corporation, et al.,

Respondents,

Richard P. Wright, as Special Administrator
 of the Estate of Corey E. Chase,

Appellant (A09-2215),

Cristy Y. Frazier, as Special Administrator
 for the Estate of Brian Frazier,

Appellant (A09-2213, A09-2214, A09-2215),
 and

BNSF Railway Company, third party plaintiff,

Respondent (A09-2213, A09-2214, A09-2215),

vs.

Richard P. Wright, as Special Administrator
 for the Estate of Corey Everett Chase, deceased,

Appellant (A09-2213, A09-2214, A09-2215).

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STATEMENT OF THE ISSUES

1. Did the district court commit plain error by instructing—at plaintiffs'¹ request—that railroad compliance with federal regulations issued pursuant to the Federal Railroad Safety Act was not conclusive proof of due care?

The district court erred in instructing the jury to assess liability based upon a federally-preempted state-common-law standard of care. Plaintiffs proposed the fundamentally erroneous instruction. Preemption was preserved for appellate review in the charge conference (T.4312), by the motion for judgment as a matter of law (T.4549-52) and in post-trial motions (R.App.39; A.Add.59). The court of appeals concluded that the instruction constituted plain error and reversed. A.Add.18.

APPOSITE AUTHORITIES:

- *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658 (1993);
- *Engvall v. Soo Line R.R. Co.*, 632 N.W.2d 560 (Minn. 2001); and
- 75 Fed. Reg. 1180 (Jan. 8, 2010).

2. Did the court of appeals correctly refuse to find invited error when plaintiffs solely proposed an instruction that negated the dispositive role of federal regulatory compliance?

The court of appeals applied plain error scrutiny in ordering a new trial because BNSF did not invite the fundamentally flawed jury instruction. A.Add.18. Plaintiffs alone asked for the jury to allocate fault without regard to evidence that established federal regulatory compliance. A.App.191, A.App.204. Preemption was preserved for appellate review in the answer (A.App.35), during the charge conference (T.4312), by the motion for judgment as a matter of law (T.4549-52) and in post-trial motions (R.App.39; A.Add.59).

¹ For clarity purposes, the appellants / plaintiffs will be referred to as “plaintiffs.” The complaints improperly named several railroad entities as defendants, but the owner and operator of the train and the proper party is BNSF Railway Company (BNSF). “A.App.” refers to Plaintiffs’ Appendix; “A.Add.” to Plaintiffs’ Addendum; and “R.App.” to BNSF’s Appendix.

APPOSITE AUTHORITIES:

- *Lewis v. The Equitable Life Assurance Soc’y of the United States*, 389 N.W.2d 876 (Minn. 1986);
 - *Nemanic v. Gopher Heating & Sheet Metal, Inc.*, 337 N.W.2d 667 (Minn. 1983); and
 - *Mjos v. Village of Howard Lake*, 287 Minn. 427, 178 N.W.2d 862 (1970).
3. Did the district court abuse discretion by denying a new trial despite newly discovered eyewitness testimony—confirming that the crossing signals had activated—and multiple prejudicial errors that denied a fair trial?

The district court denied a new trial, discounting three eyewitnesses who saw the crossing warning devices in operation moments before the accident (preserved in post-trial motions at R.App.134-41; A.Add.59). Trial errors compounded to BNSF’s detriment and resulted in an unfair trial, including: an erroneously open-ended adverse inference instruction (preserved at T.4279-T.4301, T.4351; R.App.39; A.Add.59) that plaintiffs exploited in closing argument (preserved at T.4520-21; R.App.39; A.Add.59); a special verdict question that was not specific as to time and place, enabling the jury to allocate fault based upon conduct unrelated to the accident (preserved at T.4356-60; R.App.39; A.Add.59); and an undisclosed expert witness who was improperly allowed to offer opinions (preserved at T.1816-19, T.1822, T.1868, T.4210; R.App.39; A.Add.59). Because a new trial had been ordered, the court of appeals never reached these issues. A.Add.24.

APPOSITE AUTHORITIES:

- *Keyes v. Amundson*, 391 N.W.2d 602 (N.D. 1986);
- *Brabeck v. Chicago & Nw. Ry. Co.*, 264 Minn. 160, 117 N.W.2d 921 (1962);
- *Perkins v. Nat’l R.R. Passenger Corp.*, 289 N.W.2d 462 (Minn. 1979); and
- *Dennie v. Metro. Med. Ctr.*, 387 N.W.2d 401 (Minn. 1986).

INTRODUCTION

Because the district court instructed the jury to apply a federally-preempted state-law standard of care, the court of appeals concluded that BNSF was denied a fair trial: “The jury was not asked to find whether [the railroad] had violated federal law, and such a finding was an essential prerequisite to a finding of liability.” A.Add.18. A new trial was necessary to cure the substantial prejudice inflicted by this fundamental error. *Id.*

Plaintiffs would deny BNSF plain error review, arguing that the error was “invited.” Plaintiffs go so far as to contend that BNSF “could not pursue a defense based on compliance with federal regulations” and “therefore insisted that the only predicate to railroad liability was the failure to use reasonable care—a common-law standard.” App.Br.9.² This invited error premise is manifestly false.

Plaintiffs alone asked the jury to be told that compliance with federal law was merely some evidence—not conclusive proof—of railroad due care. A.App.191; A.App.204. BNSF asserted federal preemption at all stages of the proceedings. Rather than abandoning federal preemption during trial, BNSF maintained that the overwhelming evidence of regulatory compliance compelled a directed verdict. T.4521-52; A.Add.59; R.App.39.

² Plaintiffs repeatedly make this assertion as though repetition can make it so. *See* App.Br.10 (“the trial court accepted BNSF’s invitation”); 13 (“BNSF insisted”); 14 (BNSF “specifically requested”); 19 (“BNSF sought to divert the jury’s attention away from those regulations”); 20 (“After pursuing, insisting on, and agreeing to”); 24 (“BNSF chose instead to request a common-law standard of care at trial”); 25 (BNSF “actively procured and invited the alleged error”).

The suggestion that BNSF feared jury resolution of regulatory compliance and actively distracted attention away from the issue is a fiction. Try as plaintiffs might, they cannot divine any advantage that BNSF could have achieved by having railroad liability assessed against a common law standard of care.

Even if plaintiffs had presented regulatory violation evidence, BNSF demonstrated compliance, including from plaintiffs' own expert. T.2700-05; *see also* T.1964-70, T.2933-40, R.App.494-R.App.578; R.App.622-R.App.640. BNSF's federal standard of care case was compelling. BNSF's mistake at trial was not strategic, but rather an inadvertent failure to object, pre-deliberation, to the erroneous instruction. That oversight cost BNSF *de novo* review, but plain error review was not forfeited.

Plaintiffs' invited error arguments attempt to direct attention away from plain error and the significance of the fundamentally incorrect instruction. Nonetheless, as with before the court of appeals, BNSF will focus first on the dispositive elements of the plain error. BNSF will thereafter explain why plaintiffs' invited error distractions cannot alter plain error scrutiny.

Finally, the court of appeals reversed on the basis of the fundamentally erroneous jury instruction, so the other reasons that warrant a new trial were not addressed. Regardless, definitive new testimony—regarding crossing signal functionality—and the accumulation of other trial errors also necessitate a new trial.

STATEMENT OF THE CASE AND FACTS

A. The Accident

Shortly after 10:00 p.m. on September 26, 2003, a southbound Cavalier collided with a westbound BNSF train at the Ferry Street crossing in Anoka, Minnesota. A.App.1-29. The impact killed three young adults and a teenager. *Id.* The train's conductor observed the warning gates, lights, and bells in operation. T.3967. The train's engineer watched the Cavalier maneuver around the lowered gates. T.1030-35. Other witnesses who came forward after trial confirmed that the signals had activated moments before the collision. R.App.252 -R.App.287.

Plaintiffs, trustees for the decedents' next-of-kin, sought redress against BNSF and the driver. A.App.1-29. The complaints alleged that the crossing gates, lights, and bells provided no warning of the approaching train. *Id.* BNSF countered that the system had activated and that the Cavalier had been driven around the lowered gate. A.App.35-46. Because crossing warning devices are comprehensively regulated by federal law, BNSF asserted federal preemption as an affirmative defense. *Id.*

B. The Ferry Street Crossing

Plaintiffs suggest that the Ferry Street crossing "had a troubled history of signal system malfunctions," referencing three alleged malfunction reports over a 29-month period. App.Br.3. That accusation is not true.

The three prior alleged incidents must be considered in context. First, over 26,000 trains crossed Ferry Street in the 29-month period before the accident. *See generally* T.4128. Thus any alleged malfunctions, even if true, would, at best, be anomalies.

Second, the investigation of all three reports confirmed that the signals operated as designed and complied with the covering federal regulation. Exs.4, 10, 12; T.471-78, T.3103. Third, BNSF re-inspected the system and verified functionality on a scheduled basis—monthly, quarterly, and annually—as required by the federal regulations. R.App.622; *see also* T.1942; T.1964-70; T.2062-64; T.2700-05; T.2933-40; T.2996-T.3001. Thus, in addition to BNSF’s specific response to the three reported incidents, the warning system and the crossing were examined, tested, and maintained dozens of times before September 26, 2003. *Id.* On each occasion the signals worked as designed. *Id.*

C. Search For Witnesses And The Accident Reconstruction

After the accident, BNSF scoured the area for any witnesses to the September 26 accident. R.App.249-59. The police, Sheriff, State Patrol, media, and plaintiffs also searched for evidence. Despite exhaustive investigations, no eyewitnesses other than the train crew could be found. R.App.243-48.

The Minnesota State Patrol’s Metro Crash Team undertook the official accident reconstruction—conducted by Sergeant Scott Trautner with the assistance of Sergeant Don Schmalzbauer. T.666-67, T.677, T.743, T.2790, T.2793-94. The State Patrol determined that the train struck the southbound Cavalier in the northbound lane after the vehicle had crossed into the wrong lane of traffic to circumvent the lowered gate. *Id.* The media widely reported the Patrol’s conclusions.

D. Trial

Plaintiffs' trial theory—signal activation failure³—contravened what the eyewitnesses observed,⁴ the signal event recorder logged,⁵ and the State Patrol determined.⁶ No direct evidence supported plaintiffs' theory. Instead, their case presumed an unrecorded, unobserved warning device malfunction. T.2459-T.2538.

1. Regulatory Compliance Demonstrated

At trial, plaintiffs' expert admitted that BNSF performed all federally required signal system inspections and maintenance. T.2700-05 (R.App.320). The record was replete with regulatory compliance evidence, including: bi-weekly track inspections (R.App.494, T.1964-70); monthly, quarterly, and annual grade crossing testing (R.App.622, T.2933-40); four-year cables and relays testing (R.App.641, T.2996-97); and frequent required warning time verification (R.App.395-99; R.App.400, R.App.415; R.App.415). Even the district court acknowledged BNSF's adherence to the applicable law: "There is evidence in this case that defendant BNSF followed a legal duty written into law as statute." T.4386 (R.App.340).

After conceding compliance at trial, plaintiffs changed course on appeal and charged that regulatory violations had been committed. A.Add.11 at n.9 (court of appeals observed "[Plaintiffs] now argue that BNSF did not comply with the federal standard of

³ T.2598, T.2600-01.

⁴ T.1030-35; T.3967.

⁵ R.App.400-14; R.App.596-R.App.621.

⁶ T.666-67, T.677, T.743, T.2790-94.

care, despite the fact that evidence of BNSF's compliance had been provided by [plaintiffs'] own expert"). Plaintiffs' after-the-fact complaints about regulatory lapses—*i.e.*, a missing blueprint—involved items not causally related to any signal malfunction.

2. Accident Evidence

Plaintiffs insisted at trial that the physical evidence “unmistakably” supported their activation failure theory. App.Br.5. The State Patrol's independent investigation determined otherwise.

The State Patrol's causation conclusion was based, in part, on point of impact evidence. From training and experience, the accident reconstruction experts knew that the collision would leave a cone shaped debris field, beginning where the locomotive came in contact with the automobile. T.630-31, T.652. No such pattern was found in the southbound lane. *Id.* If the Cavalier had been hit in the southbound lane debris would have accumulated further west on the roadway—near the shoulder. T.631.

The State Patrol also observed that scuff marks in the proper (southbound) lane of traffic did not align with the wheel base of an intact Cavalier, meaning that the vehicle had dropped to the pavement after being struck and lifted out of the wrong lane by the locomotive's snow plow. T.646-52, T.663-67. The physical evidence, therefore, ineluctably led to the State Patrol's official conclusion: the Cavalier had been driven around the deployed gate. T.667, T.677, T.743-44.

BNSF expert witness William Fogarty agreed that the point of impact had to have been in the northbound lane—as the Cavalier was going around the gates. T.4069-71, T.4081, T.4089, T.4110, T.4126, T.4174. Data from the automobile's black box

supported that determination. T.4100. Thus the physical evidence showed the gates to have been down.

The accident reconstruction expert that plaintiffs identified in pre-trial disclosures never took the stand. Another retained witness, Albert Klais, hypothesized that the car had been struck in the southbound lane, so the gates must have been upright. T.1123. Klais could not, however, identify a corroborating debris field. T.1071. As a substitute for what had been found on the ground just after the collision and relied upon by the Patrol, Klais speculated about the significance of gouges in the pavement. T.1073, T.1132. Klais, however, observed those gouges five months later when snow covered the ground and accident-related tire marks were long gone. *Id.*

To refute formidable signal functionality evidence, plaintiffs recruited a third State Patrolman—Ken Drevnick—to impeach the conclusions of his own department. Drevnick had not been designated as an expert, never made expert disclosures, and did not contribute to the Patrol’s report. T.816. Drevnick was nevertheless allowed to testify about causation, over BNSF’s objection, as a reconstruction “rebuttal” expert during the plaintiffs’ case-in-chief. T.1792.

Drevnick based his personal opinions on a freelance investigation conducted years after the accident. T.1876-78. Drevnick surmised that the impact had occurred in the southbound lane. T.1806-10, T.1869, T.1898. His patrolman status created the false impression that the Patrol was admitting to a mistake. T.1898, T.4467-68, T.4478. To the contrary, the State Patrol remained steadfast regarding causation. T.743-44.

3. Accusations About Missing Evidence

A few BNSF employees failed to appreciate the importance of maintaining all signal functionality evidence. The Patrol's causation conclusion unfortunately engendered some laxity regarding evidence preservation. By the time plaintiffs developed their activation failure theory, a few documents and a computer had been culled pursuant to established record retention and equipment replacement policies. *See, e.g.*, R.App.293. Specifically, the out-of-date electrical system blueprint for the crossing had been lost; thus the current version was produced. *See, e.g.*, Exs.23, 23A, 23B.

Although some evidence could not be recovered, BNSF preserved the crucial data, documents, and artifacts. The original signal system download—captured hours after the accident and printed out two days later—was maintained and produced early in discovery. R.App.400-14; R.App.596-R.App.621. These data showed timely signal activation—exactly as the train crew (and the three newly discovered witnesses) had observed. *Id.*

Plaintiffs denounce this evidence as manipulated: someone could have falsified the download by cutting and pasting. App.Br.7. Plaintiffs' experts, however, were unable to say that the substance of the data had, in fact, been altered. T.1717.

4. Adverse Inference Jury Instruction

The district court initially determined that one missing document, the signal cabinet blueprint, warranted a narrow adverse inference. R.App.292. At the close of the liability trial, without any additional spoliation findings, the district court expanded the instruction by characterizing the lost blueprint as a mere “example” of missing evidence. T.4373 (A.App.136). This open-ended instruction encouraged the jury to render verdicts based upon the absence rather than the presence of record evidence. *Id.* Plaintiffs’ closing argument urged the jury to do just that, touting a host of empty boxes that were said to represent supposedly missing evidence. T.4489-T.4507.

5. Flawed Standard Of Care Jury Instruction

BNSF raised federal preemption before and during trial. A.App.35; T.4549-52 (R.App.384). But the district court fundamentally understated the significance of federal oversight by instructing—at plaintiffs’ request (A.App.191)—that regulatory compliance was “not conclusive proof” of reasonable care. *See* A.App.150; T.4386. Thus the jury was told that compliance with the federal regulations was only some evidence of BNSF due care, which could be disregarded for fault apportionment purposes. *Id.* The law is exactly the opposite. 49 U.S.C. § 20106.

Contrary to plaintiffs’ contention, BNSF never “insisted” that common-law negligence defined railroad tort duty. App.Br.9. Plaintiffs bore the burden of proving that BNSF breached the applicable standard of care—*i.e.*, federal regulatory non-compliance—yet plaintiffs asked the court to instruct that regulatory compliance was not enough. A.App.191.

The “negligence” and “reasonable care” instructions requested by BNSF (A.App.208) concerned driver fault, which the jury was charged with assessing and for which BNSF bore the burden of proof. Plaintiffs submitted those same jury charges. A.App.186. But the fundamentally erroneous instruction—CivJig 25.46—was proposed solely by plaintiffs. A.App.188-91. BNSF failed to object, but never agreed that the jury should be told to discount regulatory compliance. A.App.204.

6. Verdicts And Post-Trial Motions

Relying on circumstantial evidence and adverse inferences from “missing” evidence, the jury found BNSF 90% at fault. BNSF filed motions for judgment as a matter of law and for new trials. A.Add.59.

BNSF’s post-trial motions raised federal preemption in no uncertain terms: “[T]he jury made no specific finding that any applicable federal laws or regulations were violated. Without such a finding the imposition of a general negligence duty on BNSF exceeds the uniform federal standard to which railroads are held.” A.Add.61-62. The common-law standard of care was also assigned as error because: “The jury was allowed to hold BNSF liable based upon common law liability standard of care when federal law preempts state law and there was no finding of any violations of federal law, regulations or standards.” A.Add.64.

BNSF’s post-trial brief focused on the instruction that deprecated compliance with federal law as “not conclusive proof of reasonable care” and argued “[a]t the very least, BNSF is entitled to a new trial because the jury was told to apply a standard of care foreclosed by federal law.” R.App.52. Plaintiffs responded on the merits without ever

complaining that the motion or memorandum provided inadequate notice of BNSF's jury instruction challenge. R.App.71.

The district court heard oral argument, including BNSF's demonstration of how the jury instruction negated federal preemption. Plaintiffs did not argue that the new trial motion failed to adequately raise the jury instruction impropriety. *See generally* Post-Trial Motion Hearing Transcript. Judge Maas ruled from the bench that "the instructions were proper." A.App.450. That ruling was incorporated into the written order, denying BNSF's post-trial motions and entering judgment on the verdicts. A.Add.34, A.Add.47.

E. Post-Verdict Witnesses

Before the post-trial briefs were due, newly discovered evidence prompted BNSF to invoke Rule 60.02. R.App.134; R.App.138. Three previously unknown witnesses had observed the signals in operation moments before the fatal collision. R.App.252; R.App.275. This evidence confirmed what the event recorder download had shown (which plaintiffs condemned as fabricated) and the train crew had observed (which plaintiffs denigrated as biased).

In addition to one eyewitness who accepted a reward from BNSF's trial counsel,⁷ two other responsible citizens—without economic incentive—came forward. On September 26, 2003, Sergeant Kevin Smith, a Coon Rapids police officer, and his wife Colleen were northbound on Ferry Street after fetching their children from a high school

⁷ After plaintiffs sought \$45 million in sanctions against trial counsel, those lawyers renewed the search for witnesses. R.App.288; R.App.291. Because prior attempts had gone for naught, the law firm offered a reward. *Id.*

football game. R.App.142-45. A 10:00 p.m. rendezvous had been pre-arranged, to be coordinated by cell phone: hence, the meeting time was not dependent upon the game's final whistle.⁸ *Id.* Shortly after the pick up, the Smiths crossed the tracks and observed the Ferry Street bells ringing, lights flashing, and gates lowering. *Id.* The train crashed into the Cavalier at 10:10 p.m.

Post-trial press coverage caused the Smiths to appreciate the significance of their experience on Ferry Street that night. *Id.* Before reading newspaper accounts of the April 20 and 21, 2009 hearings in which crossing device failure accusations were asserted, the couple was unaware that signal activation was at issue: the media had previously reported that the Cavalier had proceeded without regard to the lowered gate. *Id.*; *see also* R.App.167. On April 29, 2009, Sergeant Smith prepared a police report, recounting his vivid memory⁹ of that night. R.App.142-R.App.145. The next day, the police department sent BNSF the report.

A stipulated order called for the production of the Smiths' cell phone records. A.Add.36-44. The last train before the accident crossed Ferry Street at about 9:30 p.m., and thereafter no train moved over those tracks until the next morning. Accordingly,

⁸ Accordingly, evidence regarding game times has no bearing upon when the Smiths met up with their children.

⁹ Smith's recollection of this particular signal activation was clear: the following day he accompanied the coroner to notify the Chase family of the tragedy because Corey Chase's mother lived in Coon Rapids where Sergeant Smith was a sworn officer. R.App.160. On top of that, upon learning of the collision, the Smiths were sobered by the realization that their own children had just missed witnessing a multiple fatality accident. R.App.164-66; R.App.210-11.

phone company data would confirm whether the train that collided with the Cavalier had triggered the signal operations witnessed by the Smiths.

The records documented that the coordinating calls were made shortly after 10:00 p.m. A.Add.39, A.Add.44. Hence, the Smith car had to have been at Ferry Street just before the 10:10 p.m. accident, and the warning device activation that the Smiths witnessed had to have been in response to the train involved in the accident.

The district court denied the separate new trial motion, dismissing the compelling new evidence as “cumulative” and likely not admissible at trial. A.Add.57-58.

F. The Court Of Appeals Grants A New Liability Trial

BNSF appealed the district court’s denial of post-trial motions. The intermediate court concluded that the liability verdicts were the product of erroneous instructions that plaintiffs had proposed. A.Add.10-18. A new liability trial was ordered to “ensure fairness and the integrity of this judicial proceeding.” A.Add.18.

Since the case would be remanded, the appellate court did not address the newly discovered evidence or the cumulative prejudicial trial errors. A.Add.24. The court of appeals affirmed damages and the sanctions analysis. *Id.*

G. Clarifying The Record

Plaintiffs' brief suffers from numerous record inaccuracies, most of which will be corrected throughout this brief. One instance of selective quotation, however, merits particular attention.

Plaintiffs seek to obscure unrefuted evidence of regulatory compliance by contending that BNSF's trial attorney "acknowledged that BNSF had violated some governing federal regulations, but attempted to discount those violations as 'technical things' that were of no importance." App.Br.11; *see also* App.Br.18, 34 (citing or referring to T.4454-55). This characterization takes the closing argument completely out of context.

In full, counsel told the jury that BNSF had complied with all governing regulations and that if violations had occurred, they were not causally relevant:

It is BNSF's position that it complied with the federal regulations. And to the extent there are technical things that were not complied with, it did not cause or contribute to this accident.

T.4454-55 (A.App.494). That argument was consistent with the conclusions of plaintiffs' own expert, who admitted that all of the applicable federal inspection and maintenance obligations—the only regulations with causation ramifications—had been fulfilled. T.2700-05.

ARGUMENT

I. INSTRUCTING THAT REGULATORY COMPLIANCE DOES NOT EQUATE WITH BNSF DUE CARE CONSTITUTED PLAIN ERROR

“Whether federal law preempts state law is primarily an issue of statutory interpretation, which [this Court] review[s] de novo.” *In re Estate of Barg*, 752 N.W.2d 52, 63 (Minn. 2008). Jury instructions that fundamentally misstate the law call for plain error appellate scrutiny even if no objection was posed at trial “so long as they have been assigned as errors in the motion for new trial.” *Lewis v. The Equitable Life Assurance Soc’y of the United States*, 389 N.W.2d 876, 885 (Minn. 1986); see also *State v. Ihle*, 640 N.W.2d 910, 916 (Minn. 2002); *Lindstrom v. Yellow Taxi Co. of Minneapolis*, 298 Minn. 224, 228, 214 N.W.2d 672, 676 (1974).

The district court failed to give effect to the preemptive force of the Federal Railroad Safety Act (FRSA) by advising the jury that compliance does not prove railroad due care. Yet the United States and Minnesota Supreme Courts recognize the federal regulations to be the exclusive measure of railroad due care.

Although plaintiffs acknowledged during argument before the court of appeals that the federal standard of care governed, their current brief argues that the jury instruction was correct. The history and purpose of the FRSA demonstrate how fundamentally the instruction was in error, how substantially BNSF was prejudiced, and how manifestly the trial was unfair.

A. Federal Standards Of Care Preempt When The Subject Matter Is Covered By Federal Regulation

Congress enacted the FRSA to “promote safety in every area of railroad operations and reduce railroad-related accidents and incidents.” 49 U.S.C. § 20101. To that end, the FRSA “creates a comprehensive scheme for the regulation of rail safety[.]” *Burlington N. R.R. Co. v. State of Minn.*, 882 F.2d 1349, 1352 (8th Cir. 1989). Congress mandated that the laws regarding railroad safety, regardless of geographic application, “shall be nationally uniform to the extent practicable.” 49 U.S.C. § 20106(a)(1)(2007).¹⁰

The FRSA vests the Federal Railroad Administration (FRA) with plenary authority to prescribe and enforce railroad “regulations and issue orders for every area of railroad safety.” *In re Derailment Cases*, 416 F.3d 787, 793 (8th Cir. 2005)(quotes omitted). “Since Congress provided that delegation very forthrightly in Section 20106 and the Supreme Court has interpreted the statute to provide for preemption of State law by FRA regulations, there can be no real question that FRA has authority to preempt State regulation.” 75 Fed. Reg. 1180, 1213 (Jan. 8, 2010)(R.App.1).

To effect “[n]ational uniformity of regulation,” Congress has precluded state-law regulation of subject matters covered by FRA regulations. 49 U.S.C. § 20106(a)(2007). “Legal duties imposed on railroads by the common law fall within the scope of these broad phrases,” and states cannot “impose an independent duty on a railroad[.]” *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664, 671 (1993). As a result, state common

¹⁰ The 2007 “clarification” did not change the FRSA’s operative language or effect. *Henning v. Union Pac. R.R.*, 530 F.3d 1206, 1214-15 (10th Cir. 2008).

law claims fail when (1) FRA regulations cover the subject matter, and (2) the railroad complies with the covering regulations. *Id.* at 671-73; *see also Norfolk S. Ry. Co. v. Shanklin*, 529 U.S. 344, 358 (2000); 49 U.S.C. § 20106(a), (b)(1).

This Court has endorsed the primacy of federal regulation: “[t]he applicable standard [for railroads], as always, is the standard imposed by the [federal regulations].” *Engvall v. Soo Line R.R. Co.*, 632 N.W.2d 560, 567 (Minn. 2001). FRA regulations define railroad due care because when “no state standard is imposed, there is no danger of undermining the goal of national uniformity of railroad operating standards[.]” *Id.* at 570-71. For that reason, “claims seeking to impose a state law standard of care on...a railroad[] are preempted.” *Id.* at 571; *see also Mahutga v. Minneapolis, St. Paul & Sault Ste. Marie Ry. Co.*, 182 Minn. 362, 366, 234 N.W. 474, 476 (1931)(“[a] jury cannot be permitted to substitute its judgment” for federal agency expertise).¹¹

The essential elements of railroad negligence remain the same: (1) duty of care; (2) a breach of that duty; (3) injury; and (4) proximate causation. *Lubbers v. Anderson*, 539 N.W.2d 398, 401 (Minn. 1995). The federal regulations, however, establish the duty—or the standard of care—to which railroads can be held. *See* 49 U.S.C. § 20106; 75 Fed. Reg. 1180, 1208-10. To prove a breach—*i.e.*, railroad negligence—a plaintiff

¹¹ While this case was before the court of appeals, the FRA explained the FRSA’s preemptive effect on railroad standards of care as follows:

[A] private plaintiff may bring a tort action for damages alleging injury as a result of violation of [the federal regulations]. ... [But] [o]nce the Secretary of Transportation has covered a subject matter through a regulation or order, and thus established a Federal standard of care, Section 20106 preempts State standards of care regarding this subject matter.

75 Fed. Reg. 1180, 1208-10 (Jan. 8, 2010)(R.App.1).

must establish a regulatory violation. *Id.*; *Easterwood*, 507 U.S. at 671-73; *Shanklin*, 529 U.S. at 358; *Engvall*, 632 N.W.2d at 567.¹²

A plaintiff must also demonstrate that the regulatory infraction proximately caused the injury for which redress is sought. *Lubbers*, 539 N.W.2d at 401. A violation that cannot be casually linked to damage is of no legal import for tort liability purposes. If regulatory compliance is disputed, juries must be instructed that a federal regulatory violation is the *sine qua non* of railroad liability. *Engvall*, 632 N.W.2d at 567; 75 Fed. Reg. at 1208-10.

B. Regulatory Coverage Of Plaintiffs' Claims

Plaintiffs' accusations of BNSF fault are based upon an alleged signal activation failure, attributed to unspecified track and signal inspection or maintenance negligence. A.App.1-29. FRA regulations comprehensively cover every aspect of these subject matters. *See* 49 C.F.R. §§ 234.201-.273. For example, the signal system must be inspected once a month, and warning time accuracy must be verified annually. 49 C.F.R. §§ 234.255-.257, .259. The electronic circuits, rail joints, and track connections receive quarterly scrutiny. 49 C.F.R. § 234.271. The regulations specify how crossing signals, including flashing lights, are serviced and repaired. 49 C.F.R. § 234.217.

¹² BNSF's use of the term "negligence" at the district court did not, as plaintiffs contend, admit that a state common law standard governed railroad due care. *See* App.Br. at 9-12. Railroads can still be found "negligent"—but the federal regulations define the standard of care, and regulatory violations determine whether the applicable duty has been breached.

Track is similarly covered. The regulations specify the track construction, inspection, and maintenance regime—including the what (49 C.F.R. §§ 213.113, .115, .119, .121), the how (§§ 213.115, .119(a)-(c), .233(b)), the when (§§ 213.113, .115, .121, .233(c), .237(a)-(c)), and the by whom (§§ 212.203, 213.7, .119 & .233(a)) of those undertakings.

Signal operations are also blanketed by FRA regulations. The requirements for flashing light units, gate arm lights, lamp voltage, and gate arm length and position are all detailed in 49 C.F.R. §§ 234.253-.257. As with track, the federal regulations set forth the how, what, when and by whom of signal inspection, testing, and maintenance. 49 C.F.R. §§ 234.11-.229, 234.249-.263.

Because the FRA regulations comprehensively cover plaintiffs' crossing and track claims, the federal standard of care determines railroad liability. No other standard bears on BNSF's duty of care. Fault cannot be found if BNSF abided by the regulations, even if the signals inexplicably failed. 49 U.S.C. § 20106(b)(1); *Easterwood*, 507 U.S. at 671-73; *Shanklin*, 529 U.S. at 358.

C. The Plainly Erroneous Instruction

The jury was correctly instructed that “[t]he maintenance and operation of the active warning devices at the Ferry Street crossing is the responsibility of the defendant BNSF, pursuant to Federal Regs.” A.App.145; T.4376. After reading several federal regulations, the district court eviscerated the significance of the federal standards by telling the jury that following the regulations does not constitute due care:

Compliance with legal duty. There is evidence in this case that defendant BNSF followed a legal duty written into law as a statute. It is not conclusive proof of reasonable care if you find that BNSF followed such a legal duty. It is only evidence of reasonable care. Consider this evidence along with all the other evidence when you decide if reasonable care was used.

A.App.150; T.4386 (R.App.340).

The error goes well beyond the mere potential for jury confusion. Regulatory compliance is not just *some* indication of due care, to be weighed along with other evidence; compliance is the *only* measure of railroad tort liability. *Easterwood*, 507 U.S. at 671-73; *Engvall*, 632 N.W.2d at 567; 75 Fed. Reg. at 1208-10. Hence, the district court directed the jury to assess BNSF fault based upon a legally invalid reasonable person standard of care. Tort duties of reasonable people are assessed without regard to regulations promulgated by the FRA to promote railroad safety and uniformity.

This Court regards the applicable standard of care to be “fundamental law.” *Lindstrom*, 298 Minn. at 228-29, 214 N.W.2d at 676. Since fault was assessed pursuant to the wrong standard, the improper instruction “destroy[ed] the substantial correctness of

the charge as a whole,” resulting in “substantial prejudice” to BNSF and “causing a miscarriage of justice[.]” *Id.*

The correct federal standard of care instruction, which imposes a more rigorous burden of proof, would have influenced jury deliberations. A verdict rendered pursuant to a general negligence standard does not equate with regulatory violation liability, as required by federal law, nor does such a finding correctly allocate fault.

D. A New Trial Is Necessary

The court of appeals ordered a new trial because the error was plain and “affected BNSF’s substantial right to a fair trial.” A.Add.18. If the railroad had timely objected to the instruction, the error would have been subjected to *de novo* appellate scrutiny, which certainly would have resulted in a new trial. Because no pre-deliberation objection was lodged, the court of appeals resorted to plain error review. A.Add.17-18. That more restricted standard likewise requires a new trial because the error was fundamental, BNSF’s substantial rights were prejudiced, and error was assigned in post-trial motions. *See Lindstrom*, 298 Minn. at 228, 214 N.W.2d at 676 (“the duty or degree of care imposed on a party is fundamental law and objections to instructions relative thereto [can] be assigned for the first time in a motion for a new trial.”); *Lewis*, 389 N.W.2d at 885 (“Fundamental errors of law in jury instructions are reviewable on appeal so long as they have been assigned as errors in the motion for new trial.”).

The plain error inquiry asks whether there was (1) error; (2) that was plain; (3) which prejudiced BNSF’s substantial rights; and (4) affected the fairness, integrity or public reputation of the judicial proceedings. *State v. Griller*, 583 N.W.2d 736, 740

(Minn. 1998). Since all four factors are satisfied, the new trial order should be affirmed.¹³

1. Factors 1 & 2: Error That Was Plain

An error is plain if the result “contravenes case law, a rule, or a standard of conduct.” *State v. Ramey*, 721 N.W.2d 294, 302 (Minn. 2006). To assess the correctness of the instruction and the severity of the resulting prejudice, the inquiry should be “what might the jury have understood from the language of the court?” *Lieberman v. Korsh*, 264 Minn. 234, 240, 119 N.W.2d 180, 184 (1962)(quotes omitted).

Being told that “[i]t is not conclusive proof of reasonable care if you find that BNSF followed such a legal duty” (T.4386) would allow, indeed direct, the jury to believe that compliance with the federal regulations has no controlling effect on railroad responsibility. Recognizing that mistake, the entire court of appeals panel agreed that the instruction constituted plain error. A.Add.17 (majority); A.Add.26 (dissent: “instructing

¹³ Plaintiffs’ Petition For Review attempted to draw plain error analysis distinctions between criminal and civil cases and between the former and amended versions of Rule 51.04. R.App.126. Plaintiffs did not present these issues to the court of appeals, and their opening brief embraces criminal cases as precedents for the plain error analysis and indiscriminately cites plain error cases that were decided both before and after the Rule was amended in 2006. App.Br.29 (citing *State v. Ihle*, 640 N.W.2d 910 (Minn. 2002)); at 33 (citing *State v. Glidden*, 455 N.W.2d 744 (Minn. 1990)); at 35 (citing *State v. Ramey*, 721 N.W.2d 294 (Minn. 2006)). Arguments about any perceived distinction have, therefore, been waived. *Larson v. Degner*, 248 Minn. 59, 63, 78 N.W.2d 333, 336 (1956)(raising new issues in an appellate reply brief is “not proper practice and is not to be permitted”). But regardless, the plain error doctrine has been uniformly invoked in both criminal and civil cases when a fundamental error prejudices substantial rights. *Clifford v. Peterson*, 276 Minn. 142, 145, 149 N.W.2d 75, 77 (1967)(civil); *State v. Everson*, 749 N.W.2d 340, 348-49 (Minn. 2008)(criminal). And in substance the plain error doctrine remains the same under both the former and current versions of Rule 51. Compare R.App.686 (pre-2006 rule), with A.Add.66 (post-2006 rule); *Griller*, 583 N.W.2d at 740 (pre-2006 rule); *Everson*, 749 N.W.2d at 348-49 (post-2006 rule).

the jury that [BNSF's] liability could be established on a common-law, state-negligence basis was plain error”).

Plaintiffs contend that the instruction was correct, relying on a presumption against preemption. App.Br.29-31. Such a presumption only applies in the context of implied preemption; nothing is presumed when a federal statute expressly preempts. *Missouri Bd. of Exam'rs for Hearing Instrument Specialists v. Hearing Help Express, Inc.*, 447 F.3d 1033, 1035 (8th Cir. 2006)(presumption against preemption exclusively applicable to implied preemption, *i.e.*, when congressional preemptive intent is not express). In enacting the FRSA, Congress left no doubt about preemptive intent (49 U.S.C. § 20106(a)), and the operative language remains unchanged. *Henning*, 530 F.3d at 1214-16. In fact, state law that would disturb national railroad uniformity is presumed to be superseded. *CSX Transp., Inc. v. Williams*, 406 F.3d 667, 673 (D.C. Cir. 2005).

According to plaintiffs, BNSF's request for instructions defining “negligence” and “reasonable care”—standards applicable to driver fault—made the reading of CivJig 25.46 “a correct recitation of Minnesota law.” App.Br.30.¹⁴ Common law negligence is the correct standard of automobile operator, but not railroad, care.

By not distinguishing the different standards to which railroads and motorists are held and by instructing that regulatory compliance was not conclusive evidence of

¹⁴ The cases cited by plaintiffs were not decided in a context—*e.g.*, FRSA—in which the failure to prove contravention of a statutorily prescribed standard compels dismissal. *See Blasing v. P.R.L. Hardenbergh Co.*, 303 Minn. 41, 49, 226 N.W.2d 110, 115 (1975); *Leisy v. N. Pac. Ry. Co.*, 230 Minn. 61, 64-65, 40 N.W.2d 626, 629 (1950)(pre-FRSA). Unlike *Blasing* and *Leisy* where the statutory standards were only some evidence of due care, the federal regulations provide the exclusive metric of railroad due care.

railroad due care, the district court charged the jury with assessing BNSF fault pursuant to generally applicable state law. But unlike entities that are not subject to comprehensive federal regulations, railroad regulatory conformity is not just “some evidence” of due care; compliance is dispositive. In contrast, driver adherence to traffic laws does not by itself preclude a finding of fault.

2. Factor 3: Prejudice To BNSF’s Substantial Rights

The erroneous standard of care instruction substantially prejudiced BNSF’s right to a fair trial. Proper instructions would convey the burden of proof that plaintiffs had to carry. That guidance would have had a significant effect on the allocation of fault because the evidence established, plaintiffs’ expert admitted (T.2700-05 (R.App.320)), and the district court acknowledged (T.4386 (R.App.340)) that BNSF had complied with maintenance and inspection regulations. Since substantial evidence demonstrated that the railroad’s legal duties had been satisfied, a properly instructed jury could not have found BNSF to have been at fault—certainly not 90% at fault.

Plaintiffs counter that BNSF cannot show prejudice because “[e]vidence of violations of federal regulations abounded.” App.Br.33, 8-9, 31-37.¹⁵ This

¹⁵ Plaintiffs embrace allegations of isolated signal malfunctions that supposedly occurred years before the 2003 accident as having federal regulatory implications. App.Br.3-5, 33-34. Reports of previous incidents do not bear on whether regulatory non-compliance caused the September 2003 accident: BNSF fully abided by all inspection and testing requirements every month after each alleged malfunction. R.App.622; R.App.641; *see also* T.1942; T.1964-70; T.2062-64; T.2700-05; T.2933-40; T.2996-T.3001. The record shows that these incidents were investigated to the full extent of regulatory requirements. *Id.* But even if signal trouble tickets did not receive the attention that plaintiffs would ordain, BNSF’s subsequent monthly inspections and tests

pronouncement completely misses the point. The question presented is not whether the evidence could support a finding of some regulatory violation, but whether the jury, in fact, made such a finding. The sufficiency of regulatory violation evidence would only bear on the question of whether a jury's finding of non-compliance could be sustained. The jury, however, was never asked to decide that issue because the instruction called for no such finding. Plaintiffs' request for the record to be parsed for evidence of regulatory violations would have this Court usurp the role that a jury must perform in a new trial. Because regulatory compliance was fully proved, BNSF was severely prejudiced by the instruction that did not base railroad fault upon regulatory violations, but rather permitted compliance to be ignored.¹⁶

Further, even if the jury had believed some regulation to have been violated, the causal connection between any infraction and the accident was never considered. The jury's failure to assess whether the regulations had been contravened or to determine whether any violation had caused the accident, in effect, subjected BNSF to strict liability. Strict liability defies the congressional mandate: the FRSA only makes railroads

confirmed system functionality and establish regulatory compliance. *Id.*

¹⁶ Plaintiffs' "regulatory violations abound" arguments fly in the face of the record evidence. *See, e.g.*, Exs.135-137 (R.App.395-R.App.414), Ex.137A (R.App.415), Ex.138 (R.App.430), Ex.139, Ex.206 (R.App.494), Ex.212 (R.App.579), Exs.239-240 (R.App.581-R.App.621), Ex.241, Ex.262 (R.App.622), Exs.264-265 (R.App.641-R.App.643); T.1942, T.1964-70, T.2017-20, T.2052, T.2062-64, T.2073, T.2700-05, T.2903-06, T.2933-40, T.2996-T.3001. Most notably, plaintiffs discount their own expert's recognition that all federal inspection and maintenance obligations had been satisfied and that the system provided more warning time than required. T.2700-05 (R.App.320-25). The court of appeals noted that testimony and concluded: "The jury heard evidence of BNSF's compliance with federal regulations." A.Add.18.

accountable in tort for failing to abide by the regulations promulgated to promote railroad uniformity and safety. 49 U.S.C. § 20106.

Jury appreciation of the correct standard of care was particularly important because plaintiffs were unable to produce direct signal malfunction evidence. Instead, they argued that an activation failure could be *inferred* from speculation about the Cavalier being struck in the Southbound lane—*i.e.*, if the car was in the proper lane of traffic, the gate must not have lowered. But that inference does not establish that regulatory violations occurred or proximately caused the accident. The erroneous instruction substantially reduced plaintiffs’ burden of proof by liberating them from the obligation to connect the supposed activation failure to a violation of a specific federal regulation covering signal or track inspection and maintenance.

3. Factor 4: The Fairness, Integrity And Public Reputation Of The Judicial Proceedings

Plaintiffs and the dissent below seize upon BNSF’s alleged conduct in these proceedings as justification for new trial avoidance. App.Br.36-37; A.Add.27-28. But the district court addressed supposed railroad wrongdoing by exacting sanctions. That issue does not bear on whether an error of fundamental law prejudiced BNSF’s substantial right to have fault determined pursuant to the correct standard of care—*i.e.*, a fair trial. Alleged misconduct cannot support the conclusion that BNSF is liable for the accident—such a sanction was never requested and legally could not have been granted.

Plaintiffs go on to urge that a state common law assessment of railroad fault was harmless because “even if the jury had been asked to determine whether BNSF violated

federal regulations...the answer most assuredly would have been ‘yes.’” App.Br.34. But in the face of the overwhelming evidence and expert admissions regarding full regulatory compliance, it is impossible to predict what a properly instructed jury would have concluded. “[W]hen the trial court erroneously submits one or more negligence theories to the jury and the jury returns a general verdict for plaintiff, defendant *is entitled to judgment notwithstanding the verdict and a new trial*, unless it conclusively appears as a matter of law that the verdict is justified on one or more of the properly submitted theories or on other grounds.” *Kaiser-Bauer v. Mullan*, 609 N.W.2d 905, 911 (Minn. Ct. App. 2000)(emphasis added); *see also Schroht v. Voll*, 245 Minn. 114, 118, 71 N.W.2d 843, 846 (1955)(“The reason for requiring the new trial is the impossibility of knowing whether the general verdict was based upon an issue which was properly submitted or upon an issue which was improperly submitted.”); *Ohrmann v. Chicago & N.W. Ry. Co.*, 223 Minn. 580, 585, 27 N.W.2d 806, 809 (1947).

The jury’s verdict cannot be construed to exclude the application of state law—preempted—standards of care. Allowing such a verdict to stand would not only bless a miscarriage of justice but would also “undermine[] the goal of nationwide uniformity of railroad operating standards.” *Engvall*, 632 N.W.2d at 570-71. The fairness and integrity of the proceedings can only be vindicated by granting a new trial in which the determination of railroad fault takes into account the controlling standard of care.

4. Plain Error Review Preserved

For the first time in these proceedings, plaintiffs contend that BNSF did not assign the jury instruction error in post-trial pleadings, and, therefore, failed to preserve the issue for appellate review. App.Br.14-16. Having failed to raise inadequate notice with either lower court, plaintiffs waived the argument. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). In both of those forums, plaintiffs met the substance of BNSF's faulty jury instruction objections, never suggesting the challenge was not properly before the court.

Plaintiffs further relinquished any objection to consideration of the errant instruction by this Court when their Petition For Review neither mentioned post-trial notice deficiencies nor posited the post-trial motion issue that plaintiffs' brief now advances for review. *See In re Haslund*, 781 N.W.2d 349, 354 (Minn. 2010)(this Court declines to hear issues not raised in the petition).

In any event, BNSF clearly preserved all aspects of preemption for appellate review. BNSF's post-trial motion identified the issue as follows:

Plaintiffs' claims are preempted as a matter of law because federal law, specifically the Federal Railroad Safety Act, preempts all claims relating to railroad grade crossing active warning devices, including all standards, requirements, inspections, testing, and maintenance. *Additionally, the jury made no specific finding that any applicable federal laws or regulations were violated. Without such a finding the imposition of a general negligence duty on BNSF exceeds uniform federal standard to which railroads are held by the Federal Railroad Safety Act and the regulation promulgated by the Federal Railroad Administration.*

See A.Add.61-62 (emphasis added). The pleadings also assigned as error: "The jury was allowed to hold BNSF liable based upon common law liability standard of care when federal law preempts state law and there was no finding of any violations of federal law,

regulations or standards.” A.Add.64. Hence, BNSF clearly raised the preemptive effect of the FRSA on the standard of care for JMOL and jury instruction purposes.

BNSF thereafter pressed preemption and the federal standard of care in post-trial briefs. R.App.52 (“At the very least, BNSF is entitled to a new trial because the jury was told to apply a standard of care foreclosed by federal law.”). Plaintiffs never suggested the issue had not been joined, but instead responded on the merits. R.App.99 (“BNSF’s argument that the negligence standard set forth in the jury instructions and the negligence question on the special verdict form is ‘fundamental error’ is totally unsupported both by the evidence produced at trial and by the law.”). Obviously, plaintiffs had notice of the jury instruction challenge.

After reading “everything,”¹⁷ the district court heard preemption and jury instruction error arguments. The court thereafter ruled from the bench:

Well, I guess with respect to preemption, we’re just going to have to agree to disagree, because I do not accept the railroad’s interpretation of the law in this case. *I think that the instructions were proper and will be supported in the end.* I thought the analysis that plaintiffs’ counsel offered is consistent with the law, and I will let a higher court rule otherwise if need be. *But I just believe that the verdict was appropriate and the instructions were appropriate,* and this Court had jurisdiction on those issues.

A.App.450 (emphasis added). That ruling was incorporated into a written order, which reveals that, like plaintiffs, the district court understood the jury instruction objections to have been encompassed by the post-trial motions. A.Add.34, A.Add.47.

¹⁷ A.App.442.

The same issues were presented in the same manner to the court of appeals. *See* BNSF's court of appeals brief; Plaintiffs' (then respondents) court of appeals brief. Plaintiffs did not quibble with the post-trial notice but rejoined on the merits. Plaintiffs cannot feign being unaware of the issue after having substantively responded at the district court and again before the court of appeals. *George v. Estate of Baker*, 724 N.W.2d 1, 8 (Minn. 2006)(“we are satisfied that counsel...were on notice of [the] arguments for a new trial because they fully addressed them in their briefs and in their arguments before us.”).

In effect, plaintiffs' new-trial-notice complaint comes down to nothing more than criticism of BNSF's post-trial motion organization in which the standard of care jury instruction error is not listed under the “jury instruction” subheading. App.Br.14-16. Plaintiffs' argument literally elevates form over substance, contrary to the purpose of post-trial motions: namely, to provide both the “trial court and counsel with a unique opportunity to eliminate the need for appellate review[.]” *Sauter v. Wasemiller*, 389 N.W.2d 200, 201 (Minn. 1986); *see also Phelan v. Carey*, 222 Minn. 1, 3, 23 N.W.2d 10, 12 (1946); *Jacobson v. \$55,900 in U.S. Currency*, 728 N.W.2d 510, 524 (Minn. 2007).

Respecting that purpose, courts have repudiated the *exact* arguments plaintiffs advance to prevent appellate consideration. *See GN Danavox, Inc. v. Starkey Labs., Inc.*, 476 N.W.2d 172, 176 (Minn. Ct. App. 1991)(rejecting that party “failed to preserve the evidentiary issue it now raises because its notice of motion and motion for post-trial relief alleged no specific grounds under Minn. R. Civ. P. 59.01,” holding that the opposing party “was given an opportunity to respond, and the trial court could address the issue in

its order and memorandum denying [the] new trial motion. Under these circumstances, [the party] preserved the issue for appeal”), *rev. denied* (Minn. Dec. 13, 1991); *Lewis v. Park Nicollet Clinic*, 2007 WL 92910, at *3 (Minn. Ct. App. Jan. 16, 2007)(rejecting appellate forfeiture arguments for post-trial motion that did not reference the specific new trial grounds because “where a party addresses the grounds for its motion for a new trial in a supplemental memorandum of law, rather than in its actual notice of motion and motion for relief, the requirements of rule 59.01 are satisfied”)(R.App.687).¹⁸

Plaintiffs cannot complain for the first time before this Court that the issue most hotly litigated by both parties in the post-trial proceedings and decided by both lower courts has not been joined for this Court’s review.

¹⁸ Plaintiffs only confuse the issue by citing cases recognizing the deadline for the filing of post-trial motions to be jurisdictional. App.Br.15 (citing *Bowman v. Pamida, Inc.*, 261 N.W.2d 594, 597 (Minn. 1977)). BNSF’s motion was indisputably timely (A.Add.59), and no authority suggests that the format of post-trial pleadings has jurisdictional ramifications.

II. BNSF DID NOT INVITE THE ERROR

Plaintiffs assert that BNSF “invited” the erroneous jury instructions by not raising preemption, failing to object to the critical instruction, and proposing common law negligence instructions. App.Br.14-28.¹⁹ Plaintiffs concede that if the error was “uninvited” then plain error review would be afforded. App.Br.28-37.

A. BNSF Neither Proposed Nor Agreed To The Erroneous Instruction

Plaintiffs belatedly blame BNSF for the faulty instructions. App.Br.16-28. In fact, the fundamentally erroneous instruction came from plaintiffs and no one else. As the court of appeals noted, “BNSF did not propose the instruction to which it most strongly objects: CIVJIG 25.46, erroneously stating that BNSF’s compliance with its legal duty was not conclusive proof of reasonable care. That instruction was proposed only by [plaintiffs].” A.Add.14.

Plaintiffs acknowledge that for an error to be “invited” a party must have “actively procured” the mistake. App.Br.16. The invited error civil cases cited by plaintiffs (App.Br.16-18) all involve circumstances in which the complaining party affirmatively procured the error below by: expressly agreeing to the error; offering erroneous testimony; requesting that appropriate testimony be stricken; or failing to assert a defense that was later implicitly raised on appeal. *See LaValle v. Aqualand Pool Co., Inc.*, 257 N.W.2d 324, 327-28 (Minn. 1977)(error invited by counsel’s affirmative endorsement of

¹⁹ Plaintiffs’ amicus assumes—“as outlined by [plaintiffs]”—that BNSF invited the error. *See Minnesota Association For Justice Amicus Br.1* When that false assumption is dispelled, the amicus brief becomes moot.

jury instructions: “I wish to state for the record that...[all counsel] have thoroughly discussed the instruction that the court proposed to give in this matter and we have all agreed to those instructions”); *Isler v. Burman*, 305 Minn. 288, 295-96, 232 N.W.2d 818, 822 (1975)(error assigned on appeal regarding liability insurance evidence that was voluntarily offered by party’s witness “even though the record discloses that the [witness] had been directed by the [party’s] attorney not to mention insurance”); *In re Estate of Forsythe*, 221 Minn. 303, 311-12, 22 N.W.2d 19, 24-25 (1946)(proponents requested that testimony be stricken, which was later assigned as error; testimony should not have been struck, but the error was not prejudicial); *Zylka v. Leikvoll*, 274 Minn. 435, 446-47, 144 N.W.2d 358, 366-67 (1966)(challenge to error waived when not “asserted at trial or pleaded as a defense; no instruction was requested to that effect; and no objection or exceptions were taken to the court’s instruction...[f]urther, it is not apparent on this appeal [that the party] is assigning [it] as error”).²⁰

Rather than actively procuring the error, BNSF consistently raised the FRSA, pleading preemption in the answer (A.App.35-46), presenting evidence of full regulatory compliance (*see, e.g.*, T.2996-97, T.2998-T.3004, T.2933-40) and relying upon preemption in the JMOL motion. T.4549-52 (R.App.384-87). More than just asking for the application of a federal standard of care, BNSF maintained that regulatory compliance called for judgment as a matter of law. *Id.*

²⁰ In *McCarvel v. Phenix Ins. Co. of Brooklyn*, the defendant resisted plaintiff’s claim on one ground but later contended a second material issue should have been submitted to the jury. 64 Minn. 193, 198-200, 66 N.W. 367, 369-70 (1896). In contrast, BNSF continually asserted preemption throughout the case.

BNSF invoked preemption in the charge conference by articulating how the federal regulations constituted the duty and degree of railroad care. T.4310 (“We need to stick with the Federal Regulations that were applicable and the railroad is obliged to follow”); T.4311 (“Our position is that they are preempted, Your Honor, with respect to these kinds of cases, and the federal law is the Federal Regs are what applies, if anything, if they apply to the given facts.”); T.4312 (“The Federal Regs are what applies here. That’s what people have talked about, and the witnesses have talked about. And, again, in the interest of avoiding reversible error in the context of this case, throwing in state statutes and state regs, I don’t think it adds anything to this. You’ve got the same things they can argue by reading the Federal Regs that apply, people argue from those, how they were either violated or not.”); T.4313-14 (“there is no doubt that the federal government intended to have uniformity of signal systems across the land, that there is a preemption in effect and intention on the part of Congress. By the changes in last August Congress did not intend that signal system requirements be changed from one state to another. This is one place where federal uniformity is the goal of the statute.”). Although these arguments opposed the jury’s consideration of state railroad regulations (T.4309-16), the remarks nevertheless raised preemption and insisted that the federal regulations prevail.

Plaintiffs nonetheless deem BNSF to have acquiesced. App.Br.16-24. In fact, BNSF never accepted the flawed instruction. T.4320-22 (skipping to 25.47). Although the record reflects no formal objection, BNSF did not affirmatively agree—the requested instruction appears never to have been discussed. *Id.* In any event, the failure to object is

why *de novo* review is not available. But by taking exception to the fundamentally erroneous instruction in post-trial motions, BNSF preserved plain error review.

Plaintiffs and the dissent below would equate the failure to object with the “invitation” of error so as to preclude appellate consideration. App.Br.16-24; A.Add.28-31. If the Court were to accept that view, the plain error standard would be obviated, and Rule 59.01(f) would have no purpose. All errors that drew an objection would have the benefit of *de novo* review, and all errors that went without objection would be “invited” and denied review. This Court’s precedent and Rule 59 provide otherwise: when a party does not object at trial but misstatements of fundamental law are later challenged in post-trial motions, plain error appellate review is afforded. *See Lewis*, 389 N.W.2d at 885; *Lindstrom*, 298 Minn. at 228, 214 N.W.2d at 676. That settled principle should not be abandoned, and Rule 59 should not be rendered meaningless.

B. Plaintiffs Were Required To Propose The Appropriate Instructions For The Burden Of Proof They Bore

The condemnation of BNSF for an error of plaintiffs’ own making is all the more remarkable because they were charged with proving railroad fault. That showing needed to be made in the context of the correct standard of care. No one suggests that the instructions submitted for assessing driver fault were erroneous. The issue on appeal is the correctness of the instruction plaintiffs proposed regarding BNSF liability.

“The burden [is] on plaintiff to prove the elements of negligence[.]” *See Nemanic v. Gopher Heating & Sheet Metal, Inc.*, 337 N.W.2d 667, 670 (Minn. 1983); *see also Carlson v. Rand*, 275 Minn. 272, 276, 146 N.W.2d 190, 193 (1966). To carry the

requisite burden, a plaintiff must establish the governing duty—or standard of care²¹—to which the particular defendant can be held, then demonstrate a violation of that duty, and finally show that the breach proximately caused the injury. *See, e.g., Wartnick v. Moss & Barnett*, 490 N.W.2d 108, 116 (Minn. 1992)(“In a professional malpractice action, the plaintiff must present evidence of the *applicable* standard of care, and that the standard of care was breached.”)(emphasis added); *Admiral Merchs. Motor Freight v. O’Connor & Hannan*, 494 N.W.2d 261, 266 (Minn. 1992)(“*Expert testimony generally is required to establish a standard of care applicable to an attorney* whose conduct is alleged to have been negligent, and further to establish whether the conduct deviated from that standard.”)(emphasis added); *Todd v. Eitel Hosp.*, 306 Minn. 254, 257, 237 N.W.2d 357, 359 (1975)(“In order to prove that defendant doctor was negligent, the burden was upon plaintiff to offer expert testimony establishing (1) the standard of care recognized by the medical community, and (2) that defendant in fact departed from that standard.”).

When a plaintiff fails to prove a breach of the discrete standard of care to which the particular defendant is held, the essential elements of negligence have not been established. *Carlson*, 275 Minn. at 276, 146 N.W.2d at 193 (“If any of the foregoing elements is clearly missing...then the plaintiff has failed to sustain his burden of proof”).

²¹ Plaintiffs cannot contend that their obligation to prove the “duty” element is somehow different from the correct “standard of care.” For tort purposes “duty” is defined as “A legal relationship arising from a *standard of care*, the violation of which subjects the actor to liability.” *See* Black’s Law Dictionary (9th ed. 2009)(emphasis added); *see also Minneapolis Employees Ret. Fund v. Allison-Williams Co.*, 519 N.W.2d 176, 182 (Minn. 1994)(“Duty in negligence cases may be defined as an obligation, to which the law will give recognition and effect, *to conform to a particular standard of conduct* toward another.”)(emphasis added).

For example, evidence about a surgeon failing to satisfy a reasonable person standard of care does not constitute the breach that would give rise to physician liability. Similarly, a federally regulated entity, like a railroad, cannot be held accountable in tort for failing to satisfy reasonable person expectations.

Consistent with the applicable burden of proof, BNSF proposed “negligence” and “reasonable care” instructions for the assessment of driver fault. A.App.208. To establish railroad fault, plaintiffs had to propose federal standard of care instructions and prove that a regulatory violation proximately caused the accident. *See* 49 U.S.C. § 20106; 75 Fed. Reg. 1180, 1208-10 (Jan. 8, 2010)(R.App.1); *Easterwood*, 507 U.S. at 671-73; *Shanklin*, 529 U.S. at 358; *Engvall*, 632 N.W.2d at 567.

Instead, plaintiffs proposed common law negligence instructions. A.App.191. But fault had to be allocated between two separate actors—BNSF and the driver—and the law holds each to different standards of care. Plaintiffs’ instructions encouraged the jury to apportion liability to the railroad based upon a standard of care applicable to the driver (T.4386; A.App.191), but federal law sets different duties for railroads.

Plaintiffs and the dissent below worry that the majority decision could enable defendants to stand silent and then secure a new trial if the wrong standard of care instruction produces an unfavorable verdict. App.Br.21-23; A.Add.28-30. Such floodgate concerns are unfounded for at least two reasons. First, a defendant who does not object when a plaintiff proposes an improper instruction can only invoke the more circumscribed plain error appellate review (so long as a post-trial motion assigns the error). In contrast, an objecting defendant would have the benefit of *de novo* scrutiny.

Second, the assumption that a defendant in a complex six week trial would intentionally accede to an erroneous instruction which increases the risk of an adverse verdict, in the hopes of securing a new trial, is wildly unrealistic. Such a tactic would be especially unsound when the only eyewitnesses and law enforcement exonerated the defendant. No trial counsel would squander an opportunity for a favorable verdict—under a more demanding standard of care—just for the chance of seeking a second trial.

C. Even If BNSF Had Proposed Improper Instructions, Plain Error Review Would Remain Available

Because BNSF did not invite the error, the Court need not reach the issue of “invited error.” But if the Court were inclined to consider the issue, plain error review would not be precluded: “[t]he invited error doctrine does not apply...if an error meets all four parts of the plain error test.” *Everson*, 749 N.W.2d at 348-49 (citing *State v. Goelz*, 743 N.W.2d 249, 258 (Minn. 2007)). Appellants have been afforded plain error review despite invited error: “The state argues that invited error and unobjected-to-error are different, and that the doctrines of plain error and fundamental law do not apply to invited error. In other words, the state is asking that this court refuse to review any case in which a party appeals the validity of an instruction requested by the same party. But that is not the law in this state.” *State v. Gisege*, 561 N.W.2d 152, 158 n.5 (Minn. 1997).²²

²² Plaintiffs’ amicus attempts to draw a distinction between civil and criminal cases asserting that *Gisege*’s invited error language does not apply in the civil realm. See Association For Justice Amicus Br. at 13-15. But the footnote in *Gisege* simply distinguished *McAlpine v. Fidelity & Cas. Co. of N.Y.*, 134 Minn. 192, 199, 158 N.W. 967, 970 (1961) because the instruction was “not the important question in the case from the viewpoint of the jury” and thus not prejudicial. *Gisege*, 561 N.W.2d at 158 n.5

Minnesota law countenances plain error review, in appropriate circumstances, even when the error was “invited.” *Id.*; *Everson*, 749 N.W.2d at 348-49; *Mjos v. Village of Howard Lake*, 287 Minn. 427, 435-37, 178 N.W.2d 862, 868-69 (1970).

Mjos is instructive. Counsel for the *Mjos* plaintiffs requested generic standard of care jury instructions—without objection from defendants. *Id.* at 435-37, 178 N.W.2d at 868-69. Deliberating pursuant to that misstatement of law, the jury returned a defense verdict. *Id.* at 429-30, 178 N.W.2d at 865. After trial, plaintiffs’ counsel discovered the instructions were fundamentally wrong: the applicable statute had been recently amended to “chang[e] the degree of care required.” *Id.* at 434, 178 N.W.2d at 867. The district court agreed that the “instructions with respect to fundamental law” were erroneous and granted a new trial. *Id.* at 428, 178 N.W.2d at 864 (quoting the district court).

This Court affirmed, even though plaintiffs were the source of the errant instructions:

[T]he error of law in this case was so fundamental as to have a potentially determinative influence upon the lawsuit....It is possible that use of the correct standard...could have been of critical importance. ... [T]he use of these instructions, in the circumstances of this case, constituted such a fundamental error of law and was so highly prejudicial to plaintiffs’ cause of action as to require a new trial.

Id. at 435-37, 178 N.W.2d at 868-69.

(quotes omitted). Appellate review was, nonetheless, available to the party who offered the instruction that was later said to constitute fundamental error. *Id.* And the Court acknowledged no plain error distinction between criminal and civil actions—rather the degree of prejudice was the dispositive consideration. *Id.* *McAlpine*, therefore, confirms that parties who request the instruction to which they later assign error are nonetheless entitled to plain error review, even in civil cases. The *McAlpine* error was just not sufficiently prejudicial to warrant reversal.

BNSF is even more deserving of a new trial. In *Mjos*, the party proposing the flawed instruction later took issue with the misstatement of the law. In contrast, BNSF did not introduce the instruction to which error was assigned in post-trial motions and before the court of appeals. Plaintiffs asked for the jury to be misinformed about the dispositive effect of federal regulatory compliance. BNSF neither joined in nor endorsed that submission.

Unlike *Mjos*, in which both counsel were apparently unaware that the applicable “degree of care” had been changed,²³ plaintiffs fully appreciated the prevailing railroad standard of care when they proposed the fundamentally erroneous instruction. One of plaintiffs’ lead attorneys testified before Congress in support of the 2007 clarification to the FRSA and then worked to lobby the proposed amendment into law. *See* R.App.17 (excerpts from Sharon Van Dyck’s Congressional testimony regarding the FRSA clarification); R.App.34 (article detailing Van Dyck’s work with Congress).

Then just months *before trial*, plaintiffs’ counsel published an article regarding the effect of the 2007 clarification:

[T]he amendment clarifies that the express preemption clause creates a set of national minimum standards that consist of the federal regulations and a railroad’s internal operating rules. ... As set forth in the amendment, *these regulations constitute a federal standard of care.* ... The *plaintiff can present evidence that the federal standard articulated in the regulation was not met* and that, under the circumstances, that failure constitutes negligence. ... Now, plaintiffs alleging that the railroad or other party has failed to meet a federal standard as set forth in a regulation or order get their day in court, where they will win or lose on the claim’s merits. The amendment mandates similar results in any area on which federal safety

²³ *Mjos*, 287 Minn. at 428, 430, 178 N.W.2d at 864, 866; R.App.644.

standard “cover[s] the subject matter” of the state standard at issue. *If such a federal safety standard exists, it becomes the one against which the railroad’s conduct must be measured.*

[I]f the common law purports to hold the railroad to a standard that is stricter than or different from one articulated in a federal regulation that “covers the subject matter of the claim,” *the federal standard is substituted for the more stringent or different state common law standard the plaintiff had hoped to use.*

Sharon L. Van Dyck, *A Clear Path For Railroad Negligence Cases*, Trial at 50-53 (Feb. 2008)(emphasis added)(R.App.13).

The quoted portions of the article delineate the *exact* standard of care advocated by BNSF in post-trial motions and on appeal. Nonetheless, despite evidence and admissions of regulatory compliance, *plaintiffs* proposed an instruction that encouraged the jury to disregard the governing regulations. A.App.191; T.4386. Even more so than in *Mjos*, a new trial is needed to cure the “fundamental error of law” that was perpetrated by plaintiffs and “highly prejudicial” to BNSF. *Mjos*, 287 Minn. at 435-37, 178 N.W.2d at 868-69.

III. ADDITIONAL ERRORS SUPPORT A NEW TRIAL

The district court committed several other prejudicial errors that necessitate a new trial. This Court, like the court of appeals, does not need to address those serious missteps because the fundamentally erroneous jury instruction by itself required reversal and remand. But if this Court does reach the other issues, new trial affirmance would be independently warranted. *Hoyt Inv. Co. v. Bloomington Commerce & Trade Ctr. Assocs.*, 418 N.W.2d 173, 176 (Minn. 1988).

A. Newly Discovered Witnesses

In denying BNSF's 60.02(b) motion, the district court abused discretion²⁴ by discounting three independent eyewitnesses who saw the signals in operation moments before the collision. A.Add.57-58. Rule 60.02(b) affords relief when a party uncovers evidence that by due diligence could not have been discovered in time for a Rule 59.03 motion. *Gruenhagen v. Larson*, 310 Minn. 454, 459, 246 N.W.2d 565, 569 (1976); Minn. R. Civ. P. 60.02(b). The new evidence must be "relevant to the issues and admissible in the trial" and likely effect the outcome. *Brown v. Bertrand*, 254 Minn. 175, 180, 94 N.W.2d 543, 548 (1959); *Turner v. Suggs*, 653 N.W.2d 458, 467 (Minn. Ct. App. 2002).

²⁴ *Caballero v. Litchfield Wood-Working Co.*, 246 Minn. 124, 131, 74 N.W.2d 404, 409 (1956).

1. Due Diligence Exercised

The three new witnesses could not have been discovered sooner. BNSF canvassed the area and engaged in extensive discovery. R.App.249-51; R.App.252-59. Dozens of law enforcement officers from three different agencies looked for anyone who knew anything about the accident. *See, e.g.*, R.App.243-48. These probes turned up nothing.²⁵

Due diligence requires “reasonable investigation efforts.” *Regents of Univ. of Minn. v. Med. Inc.*, 405 N.W.2d 474, 479 (Minn. Ct. App. 1987)(citing *Brown*, 254 Minn. at 184-85, 94 N.W.2d at 550); *see also Higgins v. Star Elec., Inc.*, 908 S.W.2d 897, 903-04 (Mo. Ct. App. 1995)(“Due diligence...does not require impeccable, flawless investigation in all situations.”). BNSF had no reason to make inquiries of Sergeant Smith before trial. This officer served on a police force that had no involvement in or jurisdiction over the accident investigation. Although Smith accompanied the coroner to notify a family, he never came to the scene in a law enforcement capacity and until after trial did not officially recount his observations at Ferry Street because he did not realize the significance of signal activation. BNSF had even less reason to seek out Colleen Smith or Karianne Olson.

²⁵ The Patrol’s official accident causation conclusion received significant media attention. T.677, T.743, T.2790, T.2793-94. This coverage led the Smiths and Olson to believe that signal functionality was not at issue. *See* Sgt. Smith Depo. T.22 (R.App.167); Karianne Olson Affidavit, Statement at 15 (R.App.241).

Equally important, BNSF never “found” the Smiths. But for the press coverage, the Smiths’ experience at the crossing would not have come to light.²⁶ *Something* must prompt an inquiry: “otherwise [a party] would be compelled to send a questionnaire to all persons within the area of probable knowledge who might have some information concerning the facts in dispute.” *Wilbur v. Iowa Power & Light Co.*, 275 N.W. 43, 46 (Iowa 1937).

Rule 60.02 does not impose such an unreasonable burden on litigants. “[W]hen [the party] possesses no means of knowing that the evidence subsequently discovered was previously obtainable,” requisite due diligence can be shown. *Wilbur*, 275 N.W. at 46. Before the Smiths felt compelled to do “the right thing” (R.App.171), BNSF could not have known that an off-duty police officer from another jurisdiction had witnessed the warning devices in operation moments before the collision.

2. The New Evidence Is Relevant And Admissible

The district court disregarded the new-found testimony as “provid[ing] no new substance to the proceedings[.]” A.Add.57. But at trial, the only eyewitnesses—the train crew—were denounced by plaintiffs as “toe[ing] the company line.” *See* T.4487. Plaintiffs built their case upon surmise about the lights, gates, and bells remaining dark, motionless, and mute despite the approaching train.²⁷ The crossing conditions described

²⁶ Karianne Olson was discovered by accident when investigators were searching for a hotel clerk named “Sarah” where Olson happened to work. R.App.265-66.

²⁷ Plaintiffs’ surmise about “what could have happened” (T.2532-33, T.2644-45) cannot overcome conclusive proof because conjecture, even by experts, does not establish facts. *Amerinet, Inc. v. Xerox Corp.*, 972 F.2d 1483, 1505 (8th Cir. 1992);

by the Smiths and Olson belie that theory. The new witnesses' observations are unquestionably relevant to warning device performance, and the testimony is admissible as firsthand, eyewitness accounts of what was happening moments before the crash.

3. Not Collateral, Impeaching, Or Cumulative

The district court erroneously dismissed the newly discovered evidence as collateral and cumulative. A.App.57-58. Since no third-party eyewitness testified at trial, nothing would be impeached.

Although the Smiths and Olson corroborated the train crew, plaintiffs attacked BNSF employee credibility. *See, e.g.*, T.4487. Thus the Smiths' testimony about signal activation would not be cumulative: the witnesses are impeccably disinterested. *See Duffy v. Clippinger*, 857 F.2d 877, 880 (1st Cir. 1988)(“relatively disinterested witness” testimony is not cumulative of two “interested” witnesses).

4. The Trial Outcome Would Have Been Influenced

Courts grant new trials when belatedly discovered evidence bears on a critical issue—especially when eyewitnesses were not previously available. *Keyes v. Amundson* shows why. 391 N.W.2d 602, 603 (N.D. 1986). The *Keyes* plaintiff was seriously injured by a collision in which the “critical issue” was speed. *Id.* at 605. At the outset, eyewitnesses could not be found, and neither party could estimate how fast plaintiff's motorcycle was traveling. *Id.* at 606. In lieu of direct evidence, the jury heard “from experts who reconstructed the accident.” *Id.* The plaintiff prevailed. *Id.*

Rochester Wood Specialties, Inc. v. Rions, 286 Minn. 503, 509, 176 N.W.2d 548, 552 (1970).

Years after the accident and following post-trial motions, the defendant discovered an eyewitness.²⁸ *Id.* at 604. The trial court denied the new trial motion, only to be reversed:

Testimony that the motorcycle was accelerating could have refuted or supported the assumptions upon which the experts based their opinions and, in this respect, provides an important link in the evidence. *In a case such as this where there were no other eyewitnesses to the accident, the testimony of a newly discovered eyewitness creates a strong probability of a different result.*

Id. at 606 (emphasis added).

Like in *Keyes*, BNSF was forced to defend without the benefit of independent eyewitness testimony. Plaintiffs attacked the train crew's testimony as fabricated. T.4482-83, T.4486-87. Klais and Drevnick's speculative point of impact theories, based on nothing more than circumstantial evidence, would be debunked by unbiased observations about the gates lowering and the lights flashing.

The three new eyewitnesses validate what the train crew saw, the post-accident testing confirmed, the crossing system recorded, the event recorder printout reported, and the State Patrol concluded. Testimony from Sergeant Smith, who came forward to do the "right thing," would be compelling. R.App.171. The cell phone records confirm that the Smiths were at the crossing just before the collision. A.Add.36-44. The Rule 60.02(b) evidence is too significant to be ignored.

²⁸ The *Keyes* witness—like the Smiths and Olson—observed the scene just before the accident. 391 N.W.2d at 604.

B. Erroneous Instructions And Jury Questions

1. An Abused Open-Ended Adverse Inference

When spoliation calls for a curative instruction, the instruction must be narrowly tailored to the specific missing evidence. *See, e.g., Wajda v. Kingsbury*, 652 N.W.2d 856, 862-63 (Minn. Ct. App. 2002)(adverse inference restricted to evidence found by the court to have been spoliated). The expansive adverse inference instruction, which was not based upon specific findings of improper evidence preservation, ran roughshod over that limitation. T.4298-T.4300. The last minute “for example” insertion permitted the jury to speculate about spoliation and infer that the signals malfunctioned based upon nothing more than the absence of evidence.

The open-ended instruction erroneously allowed the jury to hypothesize that all manner of evidence was missing. The court of appeals has ruled that before adverse inferences can be drawn, a district court must find that specific evidence has been spoliated. *See, e.g., Wajda*, 652 N.W.2d at 862-63; *see also Huhta v. Thermo King Corp.*, 2004 WL 1445540, at *3 (Minn. Ct. App. June 29, 2004)(“Spoliation is a factual finding”)(R.App.694); *Auto-Owners Ins. Co. v. Heggie’s Full House Pizza, Inc.*, 2003 WL 22293643 (Minn. Ct. App. Oct. 7, 2003)(R.App.700). A judicial finding of spoliation should, therefore, have been a prerequisite to allowing drawn inferences to take the place of carried burdens of proof.

The reason for such circumscription is obvious. Few instructions are more powerful than condoning a negative inference: such a directive “brands one party as a bad actor” and “necessarily opens the door to a certain degree of speculation by the jury,

which is admonished that it may infer the presence of damaging information in the unknown contents [of certain evidence].” *Morris v. Union Pac. R.R.*, 373 F.3d 896, 900-01 (8th Cir. 2004).

The district court initially restricted the inference to a single document for which the requisite finding of spoliation had been made. R.App.292. But what had been a carefully limited instruction was infinitely expanded when the jury was invited to draw inferences from supposedly missing evidence without regard to any predicate judicial finding of spoliation:

Failure to produce evidence.

In this case the Court has determined that Defendant BNSF has failed to preserve some of the original evidence, *for example*, the blueprints of the crossing circuitry, and that this evidence should have been preserved. You are permitted to infer from this fact that the contents of the missing blueprints of the crossing circuitry, if produced, would have been favorable to the plaintiffs and unfavorable to BNSF.

A.App.136 (emphasis added); T.4373.²⁹

The “for example” expansion enabled plaintiffs to cast an adverse inference pall over every aspect of the case. The instruction incorrectly implied that the district court condoned multiple spoliation determinations. By charactering the blueprint as a mere “example” of spoliation, the district court delegated the judicial task of identifying evidence that had gone missing to the jury.

²⁹ The district court accepted, without reviewing the record, plaintiffs’ assertion that the addition of “for example” was “the product of discussions and stipulations with counsel.” Post-Trial Motions Hearing T.16-17 (A.App.243-44). *See also* A.Add.51. The record, however, reveals that BNSF never accepted, much less proposed, the “for example” expansion. *See* T.4279-T.4301, T.4296-97.

Plaintiffs took full advantage of the tainted instruction by throwing a litany of evidentiary circumstances under the same “spoliation umbrella.” T.4489-96 (R.App.341), T.4501-07 (R.App.349). In addition to the missing blueprint, plaintiffs ticked off a roster of other supposedly “missing evidence” as the closing argument became adorned with a wall of empty boxes—each of which was said to represent a repository for withheld or destroyed evidence. T.4489-T.4496. Counsel went on to cajole: “I was going through the list of missing evidence. Before I could get all of the pieces put onto the empty boxes, Office Max ran out of boxes. There’s some on my list, but I don’t have a box for each of them.” T.4496. He thereafter repeatedly encouraged the jury to make assumptions about each empty box. T.4490 (“You can infer what’s in it from it not being here.”); T.4492; T.4504.

The jury was led to believe that items cleaned out in the ordinary course of business, never created in the first place, wholly unrelated to the accident, or never discussed at all because “Office Max ran out of boxes” were all smoking guns—suppressed by BNSF to shroud wrongdoing. The “for example” instruction was transformed into a blank spoliation check, which plaintiffs cashed over and over again.³⁰

³⁰ In addition, the empty boxes ran afoul of well established procedures regarding the use of props in closing arguments. *See Brabeck v. Chicago & Nw. Ry. Co.*, 264 Minn. 160, 168, 117 N.W.2d 921, 926-27 (1962)(visual aids allowed “provided they contain only factual statements supported by the evidence and are *not argumentative in nature*”)(emphasis added). “[T]he proposed material *should be submitted to the court and to opposing counsel in chambers prior to argument* whenever the use of such visual aids is anticipated.” *Id.* (emphasis added); *see also Malik v. Johnson*, 300 Minn. 252, 263, 219 N.W.2d 631, 638 (1974)(proxies for unaccounted for evidence excluded because

Notably, the empty box theatrics followed co-counsel's "send a message" argument: "[t]hrough your verdict, you can tell the railroad that candid disclosures, timely responses, truthful answers are not outdated." T.4472. The "vice of such an appeal" also calls for a new trial. *See Krenik v. Westerman*, 201 Minn. 255, 258, 275 N.W. 849, 850-51 (1937)("We regret that clients must suffer for the overzealousness of counsel, but if the courts are to retain the respect of the people they must restrain counsel from going beyond the limits of fair argument.").

2. Unrestricted Special Verdict Question

This Court reviews the trial court's exercise of special verdict discretion³¹ "to determine whether there is an error of fundamental law or controlling principle[.]" *Estate of Hartz v. Nelson*, 437 N.W.2d 749, 752 (Minn. Ct. App. 1989)(citing *Fallin v. Maplewood-North St. Paul Sch. Dist. No. 622*, 362 N.W.2d 318, 320 (Minn. 1985)).

The district court erred by posing a special verdict question that was not limited to the time and place of the accident: "Was BNSF Railway Company negligent?" R.App.298. *See also* T.4356-60 (BNSF objections and ruling below)(R.App.333-37). The special verdict question, as stated, allowed BNSF to be put on trial for incidents from April 2001, March 2002, and February 2003 that had no bearing on the September 26, 2003 accident and that certainly did not involve a federal regulatory violation which proximately caused plaintiffs' injuries.

"visual aids used in final argument must be submitted to the court for approval"). BNSF encountered counsel's closing argument props at the same time as the jury.

³¹ *Hill v. Okay Constr. Co., Inc.*, 312 Minn. 324, 340, 252 N.W.2d 107, 118 (1977).

Plaintiffs' counsel took full advantage of that opportunity. T.4356-59 (R.App.333-36). With leave from the district court, plaintiffs incessantly trumpeted improperly admitted, dissimilar, and unproven prior incidents. *See, e.g.*, Exs.4-6 (R.App.388-R.App.390), 9-12 (R.App.391-R.App.394); T.89-92, T.94, T.179-209, T.216-17, T.233, T.246-48, T.251-52, T.256-62, T.321-22, T.326-62, T.378, T.806, T.946-49, T.981-82, T.1352-54, T.1431, T.1602-06, T.1841-45, T.2081-82, T.2169, T.2251-52, T.2485-92, T.2537-40, T.2697-2702, T.2719-20, T.2882-90, T.2894-98, T.2905, T.2909-12, T.2943-48, T.2955-56, T.2975-79, T.3013-14, T.3019, T.3024-25, T.3035-60, T.3102-03, T.3109-13, T.3128-31, T.3137, T.3149-55, T.3212-13, T.4496-97, T.4501, T.4558.

Plaintiffs' reliance on the dissimilar prior incidents confused the jury and begat verdicts based upon unrelated events. In crossing litigation "[t]he focus of a jury's inquiry [must] be whether the railroad exercised due care under all of the circumstances of the case before it." *Perkins v. Nat'l R.R. Passenger Corp.*, 289 N.W.2d 462, 463-64 (Minn. 1979). Thus the dispositive issue was not whether BNSF was negligent in the abstract, but rather whether railroad negligence (*i.e.*, regulatory violation) on the night of September 26, 2003 caused the fatal collision. That focus never happened because the jury's attention was lured away from the relevant time and circumstances by the open-ended negligence question.

C. Non-Disclosed Expert Opinion

The admission of expert testimony must pass abuse of discretion muster. *Benson v. N. Gopher Enters., Inc.*, 455 N.W.2d 444, 445-46 (Minn. 1990); *State v. Gutierrez*, 667 N.W.2d 426, 435 (Minn. 2003). Trooper Ken Drevnick—undisclosed by plaintiffs as a witness, much less an expert³²—should never have been allowed to take the stand.

During plaintiffs’ case-in-chief, Sergeant Trautner was asked to recount the Patrol’s causation conclusions. Plaintiffs then called Drevnick—over BNSF’s objection³³—to “rebut” Trautner. Drevnick came as a complete surprise and ultimately emerged as plaintiffs’ star accident reconstructionist.

Expert disclosure requirements eliminate “trial by ambush.” *United States v. Proctor & Gamble, Co.*, 356 U.S. 677, 682 (1958). Debuting a never before identified expert subverts the purpose of pretrial disclosure. *Beller v. United States*, 221 F.R.D. 696, 701 (D.N.M. 2003)(the rules do not “give license to sandbag one’s opponent with claims and issues which should have been included in the expert witness’ report”).

The deadline for expert disclosure came and went without plaintiffs ever mentioning Drevnick. R.App.300; R.App.309.³⁴ Accordingly his undisclosed opinions should not have been unsheathed. *See Dennie v. Metro. Med. Ctr.*, 387 N.W.2d 401, 405 (Minn. 1986); *Krech v. Erdman*, 305 Minn. 215, 218, 233 N.W.2d 555, 557 (1975).

³² R.App.309.

³³ T.1816-19, T.1822, T.1868, T.4210.

³⁴ BNSF listed Drevnick (T.538-39, T.647-48), but solely to provide foundation for photographs that he had taken of an exemplar car. T.1819.

Plaintiffs excuse nondisclosure by pretending that Drevnick was merely allowed to “rebut” Trautner, which Drevnick was said to have been competent to do because the reconstruction was supposedly a “collaborative” undertaking that included Drevnick. T.1816-31. At trial, however, Trautner did not characterize his report as a “consensus opinion,” describe the investigation as a “team” effort, or purport to speak for Drevnick. T.1817. BNSF brought these facts to Judge Maas’s attention. T.1816-19, T.1822. Plaintiffs responded that “[t]he record [on this subject] will speak for itself.” T.1817. The district court accepted plaintiffs’ assertion without confirmation and declared that “when the word ‘consensus’ was used, then the rebuttal opportunity presented itself.” T.1820.

The record does speak for itself. Trautner never uttered the word “consensus” in front of the jury. T.509-T.744. Trautner did not characterize his work as a “team” effort, and Drevnick was not “specifically named”³⁵ as a reconstruction participant. *Id.* Drevnick did no more than photograph an exemplar Cavalier several days after the accident. T.538-39, T.647-48. Hence, Drevnick was undisclosed, uninvolved, and inappropriately allowed to impeach the Patrol’s official causation conclusion.

After trial, plaintiffs regrouped to absolve their failure to disclose Drevnick—this time relying upon Trautner’s use of the word “consensus” in his pre-trial deposition. *See* Pltfs’ Post-Trial Br. at 45-52 (R.App.71). The district court accepted this after-the-fact rationalization, inexplicably ruling that the “‘collaboration’ angle” in Trautner’s

³⁵ T.1817.

deposition allowed for “rebuttal.” A.Add.53.³⁶ The jury, however, was never exposed to Trautner’s deposition: he testified live. The door to rebuttal cannot be opened by “evidence” that the jury does not hear. *Busch v. Busch Constr., Inc.*, 262 N.W.2d 377, 386 (Minn. 1977); *Danielson v. Hanford*, 352 N.W.2d 758, 762 (Minn. Ct. App. 1984).³⁷

The Patrol never retreated from the conclusion that the Cavalier proceeded around the lowered gate. T.743-44. Yet, Drevnick—donning his “State Trooper” badge—was allowed to opine that the Patrol had made “a mistake” and imply that the official causation conclusion had been disavowed. T.1896.

Plaintiffs used Drevnick’s “expert” testimony to insinuate that the Patrol had second thoughts. *See, e.g.*, T.4467-68 (“the only state patrol officer who had the courage to come forward and say, We made a mistake, was sergeant Drevnick.”); T.4478. Allowing this last minute, undisclosed “rebuttal” testimony to besmirch the official causation conclusion severely prejudiced BNSF and confounded the jury. A new trial is needed to undo the adverse effect of the Drevnick surprise.

³⁶ The district court’s order carefully avoids calling Drevnick a rebuttal or expert witness. A.Add.52-53. But the transcript demonstrates that Drevnick was only allowed to “rebut” Trautner (T.1820) and that Drevnick repeatedly rendered opinions only experts are qualified to give. T.4467-68, T.4478.

³⁷ Plaintiffs reshuffled their “rebuttal” justification at the post-trial motion hearing, contending that the parties agreed to allow Drevnick. Although the district court *again* accepted plaintiffs’ story, the transcript shows otherwise—the record contains no such “agreements.” *See* Minn. R. App. P. 110.01; *Vossen v. Thulin*, 244 Minn. 351, 353, 70 N.W.2d 287, 288 (1955). In fact, the record reflects vehement BNSF objections. T.1816-19, T.1822, T.1868, T.4210. BNSF would not have so vigorously protested if Drevnick had taken the stand by consent.

CONCLUSION

The fundamental misstatement of law in the jury instructions that plaintiffs alone proposed requires a new trial: railroads can only be held accountable in tort for failing to abide by the federal standard of care when the subject matter of a claim is covered by federal regulations. Plaintiffs bore the burden of proving that BNSF did not exercise due care—namely, compliance with the covering federal regulations—and that such violation caused the accident. Instead, plaintiffs requested and received instructions that told the jury to disregard the exclusive railroad standard of care. BNSF properly preserved the issue for plain error review; such scrutiny requires a new trial. Even if BNSF had proposed improper instructions, plain error review would still be available, and a new trial would be warranted.

Recently discovered evidence independently justifies a new trial: the previously unknown witnesses saw the crossing signals in operation, the critical fact issue in this case. On top of that, the accumulation of trial errors further necessitates a new trial to remedy the severe prejudice to which BNSF was subjected. Under any scenario, this Court should affirm the remand for a new trial.³⁸

³⁸ In affirming the remand, this Court should reverse the district court's costs order.

Dated: February 14, 2011

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CERTIFICATE OF COMPLIANCE

This brief complies with the word limitations of Minn. R. Civ. App. P. 132.01, subd. 3(a). The brief was prepared using Microsoft Word 2003, which reports that the brief contains 14,587 words.

